

Responses to Comments Document

1. Comment Summary: EPA received numerous comments opposing ODAFF's application in general, as well as a good many supporting EPA's approval of the application.

Response: EPA received over 300 comments either in support of or opposition to ODAFF's application to implement the NPDES program for discharges within its jurisdiction. Many of the comments, particularly those in opposition to the program, noted specific concerns, such as whether ODAFF has a conflict of interest or whether the Agency has the resources necessary to run the program. EPA has broken out these specific concerns into general categories and attempted to address them separately in this response to comments. However, many of the comments were of a more general nature. EPA received numerous letters expressing strong support for the AgPDES program, many of which were from trade organizations within the state, who welcomed the opportunity to eliminate the duplication of services between ODAFF and EPA Region 6. These commenters also pointed out that authorization for ODAFF to run the AgPDES program has been a priority for the state of Oklahoma for almost 20 years, and that state legislation creating the AgPDES program was supported by an overwhelming bi-partisan majority in the Oklahoma House and Senate. EPA also received a great many letters from citizens and public interest groups strongly advocating for EPA to disapprove ODAFF's request for program approval. Many of these commenters expressed concern that the AgPDES program would provide a lesser degree of protection for the state's waters and ecosystems than the program currently run by EPA.

The CWA mandates that EPA approve a state's request to administer its own NPDES program for discharges to navigable waters within its jurisdiction if the state's submittal meets the requirements of the Act and federal regulations.

EPA has determined that the program submitted by ODAFF meets the CWA requirements for a state run partial NPDES program pursuant to CWA §§402(b) and (n). As discussed in more detail elsewhere in this response to comments document, as part of its application, ODAFF submitted a complete program description describing the AgPDES program, including permitting, compliance assurance and enforcement functions. ODAFF also submitted a statement from ODAFF's independent legal counsel that the laws of Oklahoma provide adequate authority to carry out the program and to meet the requirements of the CWA and federal regulations, as well as a memorandum of agreement (MOA) executed by the Commissioner of Agriculture detailing the responsibilities of both ODAFF and EPA under the AgPDES program. Based on its careful review of these documents, EPA has determined that ODAFF has a program in place that is at least as stringent as the federal program. In addition, ODAFF has for many years operated a program under state law to regulate wastes from animal feeding operations that is similar in many ways to the federal program, and has worked in close cooperation with EPA Region 6 in the enforcement of federal CAFO requirements in the state of Oklahoma.

Recognizing the concerns expressed by some commenters, EPA notes that authorization of the state program does not mean EPA will not maintain an active presence. Following authorization, EPA will continue to work closely with the state to provide guidance and assistance and to ensure that the AgPDES program remains consistent with federal and state law.

2. Comment Summary: Many of the commenters in opposition to ODAFF's application argued that ODAFF's mission is to promote, not regulate the agriculture industry in Oklahoma and that this conflict of interest would prevent ODAFF from effectively ensuring compliance with the requirements of the CWA and the NPDES program. Several of the commenters specifically noted that some of the producers ODAFF would regulate sit on the Board of Agriculture, which is the governing body of ODAFF. As a result, many commenters were concerned that ODAFF would be vulnerable to political pressure from state politicians and industry.

Response: The ODAFF describes itself as a public service agency that serves both as an advocate and as a regulator for Oklahoma's agricultural producers and consumers. ODAFF's mission is defined by the Oklahoma State Legislature and explained in Chapter 5 of ODAFF's Program Description. Pursuant to state statute, the agency's mission is a dual mission to both advocate for and regulate the state's agriculture industry, which requires ODAFF to have a close working relationship with the state's agricultural industry. This close relationship might understandably raise concerns over a possible conflict of interest. To address such concerns, both the CWA and federal regulations include conflict of interest provisions that must be met by any state agency seeking NPDES authority. These provisions, found at §304(i)(2)(D) of the CWA and 40 CFR §123.25(c), prohibit persons who receive, or have during the previous two years received, a significant portion of their income directly or indirectly from permit holders or applicants for a permit, from serving as a member of a board or body which approves permit applications or portions thereof. Because the governing body of ODAFF is the Oklahoma Board of Agriculture, whose members are required by the Oklahoma Constitution to be farmers and thus are likely to have a conflict of interest under federal law, the state of Oklahoma chose to alter the organizational structure of ODAFF to ensure that the agency would be in compliance with federal conflict of interest requirements. Toward this end, the Oklahoma Legislature created the position of ODAFF Director of AgPDES. Under state law, the Director of AgPDES, who has exclusive authority to issue, deny, modify, or revoke AgPDES permits and to issue final enforcement orders or assess administrative penalties, must meet the requirements of Section 304(i) of the CWA and 40 CFR §123.25(c) regarding conflicts of interest. Additional provisions of Oklahoma law provide that the Director is prohibited from having a business relationship or receiving compensation from businesses or entity subject to the AgPDES program. Oklahoma state law requires any ODAFF employee in a technical, supervisory or administrative position who participates in work relating to the review, issuance, or enforcement of permits pursuant to the Oklahoma Agricultural Code to disclose that they are an owner, stockholder, employee or officer of, or receives compensation from, any corporation, partnership, or other business or entity regulated by the Department. See OAC §2-2A-4.

ODAFF's Legal Counsel addressed the conflict of interest issue in the Statement of Legal Authority submitted as part of the state's request for authorization, and stated specifically that the AgPDES Director operates independently of the Oklahoma Board of Agriculture and is fully insulated from Board members who might have actual or perceived conflicts of interest. After closely reviewing ODAFF's statutes and regulations regarding conflict of interest, as well as the organizational structure of the Agency, EPA has determined that ODAFF is in compliance with CWA §304(i) and 40 CFR §123.25(c).

In addition, EPA does not believe ODAFF's existing relationship with industry will prevent it from properly carrying out its regulatory duties under the federal NPDES program. The state of Oklahoma has statutes and regulations in place to implement the AgPDES permitting and enforcement programs that are at least as stringent as federal law, and EPA is aware of nothing to indicate that ODAFF will not properly enforce those statutes and regulations. Although ODAFF's mission does include promoting the agricultural industry in

Oklahoma, since 1997 it has also been tasked with protecting the state's soils and waters from animal waste. ODAFF's Agricultural Environmental Management Services (AEMS) division is already operating a program under state law to regulate waste from animal feeding operations that is similar in many ways to the federal program. Through that program, AEMS has demonstrated its willingness to address compliance shortcomings by Oklahoma agriculture producers. In addition, while EPA has been the permitting authority under the federal CWA for NPDES discharges from entities subject to ODAFF jurisdiction, AEMS has provided support to EPA for its CWA compliance and enforcements activities. As part of its oversight authority, which is detailed in the MOA between EPA and ODAFF, EPA will monitor ODAFF's implementation of the AgPDES program following authorization to ensure that it is operated in compliance with the CWA and all applicable federal regulations. Pursuant to 40 CFR §123.44, EPA may object to permits that are not in compliance with federal law, and the agency retains independent enforcement authority to address civil and/or criminal CWA violations.

3. Comment Summary: Many commenters in opposition to approval of the AgPDES program expressed concerns regarding ODAFF's resources to implement the program. Many of the commenters argued that ODAFF does not have the financial resources to implement the AgPDES program, several noting that ODAFF has undergone a 20% reduction in funding in recent years. Many commenters also argued that ODAFF does not have sufficient staff to properly implement the AgPDES program.

Response: In Chapter 4 of its Program Description document, ODAFF acknowledged that adequate resources are essential to the success of the AgPDES program, and as required by 40 CFR §123.22(b), provided to EPA a description of the cost of establishing and administering the proposed AgPDES program for the first two years after program approval. ODAFF estimates that the additional annual expense it will incur to run the AgPDES program for each of the first two (2) years will total \$532,000 per year, broken down between Salaries/Benefits, Professional Services and Travel. (See Table 4-2). Estimated expenses include the hiring of an additional eight (8) FTEs or equivalent, setting up offices and acquiring equipment and supplies, and day-to-day operational expenses associated with running the permitting, compliance monitoring and enforcement functions of the AgPDES program. The funds needed to cover AgPDES program expenses will come from a combination of funds appropriated for that purpose by the Oklahoma State Legislature, revenue received by ODAFF in the form of AgPDES permit fees and existing ODAFF General Operating Funds.

In anticipation of state program assumption, the Oklahoma State Legislature appropriated \$673,583.00 of state general funds in 2009 that will be used to meet ODAFF's first and second year expenses for implementing the AgPDES program. ODAFF will use \$403,900 of these appropriated funds during the first year of program implementation and the remaining \$269,683 during the second year. The remaining expenses in year one will be covered by annual fees charged by ODAFF for coverage under an AgPDES individual permit or for authorization under an AgPDES general permit. The AgPDES fee schedule has been promulgated under OAC §35:44-1-22 and is also included for reference in Table 4-1 of ODAFF's Program Description. For the second year after program authorization, expenses not covered by either the funds appropriated by the Legislature or permit fees will be covered by existing ODAFF General Operating Funds. A detailed breakdown of the yearly income expected from permitting fees and the amount anticipated to come from General Operating Funds is included in Table 4-3 of ODAFF's Program Description

In addition to the funding information provided in Chapter 4, ODAFF also included detailed information regarding ODAFF's organization and staffing as it relates to the AgPDES program, including a breakdown of

various staff responsibilities and position descriptions. In addition to the eight (8) additional FTEs anticipated to be hired specifically for the AgPDES program, the twenty-two (22) current administrative and technical staff of the AEMS division, including engineers, hydrologists, soil scientists, geologists, environmental program specialists, field inspectors, administrative officers, administrative assistants and clerical support, will also provide support for the AgPDES program.

Based on its review of the resources committed to the AgPDES program, including both estimated funding requirements and revenue sources, as well as staffing requirements and qualifications, EPA has determined that ODAFF has adequate resources to run the program upon authorization and for the first two years following authorization. Although federal regulations do not require states to submit resource data for more than two years following program authorization, states are responsible for funding the program on an ongoing basis, and failure to adequately do so is potential grounds for program withdrawal under 40 CFR §123.63. ODAFF committed in Section III.A.2 of the MOA between ODAFF and EPA to maintain the resources necessary to carry out the responsibilities specified in the MOA and prescribed by state and federal law. As part of EPA's oversight responsibilities, EPA will monitor the resources available to ODAFF for its AgPDES program to ensure that they are compliant with the regulatory requirements for a state-run program.

4. Comment Summary: Several commenters expressed opposition to ODAFF's application because they believe ODAFF's past enforcement against CAFOs has been poor and that the agency has done little in the past to control pollution from CAFOs. One commenter asked EPA to check its files concerning a facility in Blaine County, Oklahoma named Wheeler Brothers Feedlot, and stated that there were problems stemming from ODAFF's failure to monitor and assist people living in that area.

Response: Up until now, EPA has been the permitting authority under the federal CWA for NPDES discharges subject to ODAFF jurisdiction. Even though ODAFF has conducted inspections with or on behalf of EPA in the past, EPA was responsible for CWA enforcement actions against CAFOs in Oklahoma. EPA will continue to partner with ODAFF to carry out certain enforcement activities as described in Section VI of the MOA. ODAFF has for some time been tasked with protecting the state's soils and waters from animal wastes. Since 1997, ODAFF's AEMS division has been operating a program under state law that regulates waste from animal feeding operations that is similar in many ways to the federal program. The Compliance Assurance and Enforcement Division of EPA Region 6 has worked in close cooperation with ODAFF to enforce federal CAFO requirements in the state of Oklahoma for many years, with ODAFF often conducting CAFO inspections in conjunction with or on behalf of EPA.

Many states across the nation have struggled to address the issues associated with CAFO wastes. Oklahoma is no exception. However, the state has taken various actions to protect the Oklahoma environment from pollution associated with animal wastes, including passing the Oklahoma Concentrated Animal Feeding Operation Act and creating the AEMS division at ODAFF to help develop and coordinate environmental policies and programs. Although not previously authorized to implement the federal CWA CAFO program, ODAFF's AEMS division has for years issued state licenses to CAFOs, inspected facilities and worked with operators to protect water quality. Since 1999, AEMS has collected nearly \$1.6 million in fines against violators of state CAFO laws. In addition, ODAFF worked closely with EPA Region 6 and DOJ to bring an enforcement action in 2011 against Mahard Egg Farm, Inc. that resulted in a penalty of \$1.9 million for CWA violations at the company's egg production facilities in Texas and Oklahoma. The penalty against Mahard is the largest penalty to be paid thusfar in a federal CWA enforcement action against a CAFO. Currently, EPA Region 6 is working closely with ODAFF to address CWA

violations at the Wheeler Brothers feedlot in Watonga, OK. Following authorization of the CAFO program to ODAFF, EPA will continue to assist ODAFF, in its oversight capacity, until all the violations at this facility have been addressed. The Region 6 Water Enforcement Branch has praised ODAFF for its active participation in CAFO compliance and enforcement through its AFO licensing program and its support and assistance to EPA in the past. EPA Region 6 is confident that ODAFF has gained valuable hands-on CAFO enforcement and compliance experience by working together with EPA on complex enforcement cases, such as the Mahard and Wheeler Brothers cases.

5. Comment Summary: Several commenters opposed ODAFF's application because they do not believe ODAFF will enforce against CAFOs in the future or protect the environment for the general public. Some commenters noted that ODAFF's proposed budget does not include income from the collection of fines against CAFOs and wondered if this means ODAFF does not intend to fine CAFOs. Other commenters asked how many inspections ODAFF intends to conduct after authorization and who will conduct them. These commenters also asked about ODAFF's enforcement authorities and how they will use them. Several commenters expressed concern that approval of the AgPDES program would mean less regulation over the CAFO industry and removal of existing protections, thus harming water quality.

Response: EPA does not agree that authorizing ODAFF to implement the AgPDES program will remove existing environmental protections for the state of Oklahoma. Up until now, EPA has been the permitting authority under the federal CWA for NPDES discharges subject to ODAFF jurisdiction, i.e., discharges associated with CAFO operations, discharges from the application of biological pesticides or chemical pesticides that leave a residue, discharges from silviculture activities, and discharges of storm water from agricultural activities. However, in order to obtain authorization to implement its own NPDES program under the CWA, ODAFF was required to demonstrate that it has a state program in place that is at least as stringent as the federal program, and following authorization, the state program must at all times be conducted in accordance with the requirements of the CWA and 40 CFR Part 123. As part of the state program approval process, ODAFF was required to submit a complete program description describing how ODAFF intends to carry out the AgPDES program, including permitting, compliance assurance, and enforcement functions. The agency was also required to submit a statement from ODAFF's independent legal counsel that the laws of Oklahoma provide adequate authority to carry out the program described, and to meet the requirements of the CWA and federal regulations. Finally, ODAFF was required to submit a MOA executed by the Commissioner of Agriculture detailing the responsibilities of both ODAFF and EPA under the AgPDES program. Among other things, the MOA includes provisions on the state's compliance monitoring and enforcement programs, including provisions for the coordination of compliance monitoring activities by the state and EPA. Upon program authorization, the MOA is signed by the Regional Administrator of EPA. Pursuant to 40 CFR §123.24, the Regional Administrator may not approve any MOA that restricts EPA's statutory oversight ability. Following authorization, EPA will continue to work closely with the state and, as part of its oversight responsibilities, will provide guidance and assistance to ensure that the AgPDES program remains consistent with federal and state law. Pursuant to §402(c) of the CWA and 40 CFR §123.63, EPA may withdraw program approval if the state program ceases to comply with federal requirements. In addition, although upon authorization ODAFF will assume primary responsibility for taking timely and appropriate enforcement action for violations within its jurisdictional authority, EPA retains independent enforcement authority to address civil and/or criminal CWA violations pursuant to CWA §§309 and 402(i). In addition, EPA retains authority to pursue enforcement action against a violator if it determines ODAFF has not

taken timely enforcement action or that the penalty sought by ODAF was not appropriate under the Act (generally referred to as “over-filing”).

Regarding ODAFF’s enforcement program, ODAFF submitted an Enforcement Management System (EMS) as part of its program submittal, meeting the requirements for a compliance evaluation management system under 40 CFR §123.26(e)(4). The EMS constitutes a system for translating compliance information into timely and appropriate enforcement actions. It also establishes a system for identifying priorities and directing the flow of enforcement actions based on these priorities and available resources. Although the specific number of inspections to be performed after approval of the AgPDES program, and who will perform them, is to be determined by ODAFF on a year-by-year basis, ODAFF’s inspection procedures must remain in compliance with the requirements of 40 CFR §123.26. While the EMS embodies certain fundamental principles, the process for applying these principles must be flexible and dynamic. For instance, the EMS describes an evaluation process whereby violations and discrepancies that are identified during the evaluation procedures are reviewed to evaluate the appropriate enforcement response. However, in situations where immediate action is required to protect the public health or safety or the environment, emergency action is taken to address the situation without waiting for the completion of this review process. See Chapter 5 of the EMS.

ODAFF’s enforcement authority is outlined in Section VI of the MOA. Chapter 9 of the program description and Chapter 5 of the EMS provide information regarding ODAFF’s enforcement functions and procedures. ODAFF’s failure to include income from fines against CAFOs as a revenue source in its proposed budget does not mean ODAFF does not intend to enforce against CAFOs or collect fines. Under Oklahoma law, monies collected by ODAFF as a result of penalties/fines go into the Oklahoma Department of Agriculture Revolving Fund, which is not cited by ODAFF as a source of funding for the AgPDES program.

6. Comment Summary: Numerous commenters opposed ODAFF’s application based on their concern that Oklahoma’s CAFO operations have an effect on downstream states. One commenter questioned whether it should be EPA, and not the state, which controls pollution spilling from one state into another.

Response: It is true that just as Arkansas CAFO operations impact water quality in Oklahoma waters, Oklahoma CAFO operations impact the waters of other states and tribes as well. The CWA addresses the impact that discharges from one state might have on downstream states in several places. Section 402(b) of the CWA provides that EPA shall not approve a state’s request to administer its own permit program for discharges into navigable waters within its jurisdiction unless the state has, among other things, authority “[t]o insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such applications” and “[to] insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.” CWA §402(b)(3)&(5). In addition, the CWA requires dischargers in upstream states to comply with downstream state water quality standards. See Arkansas v. Oklahoma, 503 U.S. 91 (1992), construing §§1341 and 1342 of the CWA. EPA regulations further provide that an NPDES permit shall not be issued “[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.” 40 CFR §122.4(d). Per 40 CFR §122.2, “State” includes an Indian Tribe as defined in the regulations which meets the requirements of 40 CFR §123.31

As part of its authorization submittal package, ODAFF submitted copies of the statutes and regulations applicable to the AgPDES program, as well as a Statement of Legal Authority in which ODAFF's legal counsel certifies that ODAFF has the legal authorities necessary to run the program. Section I.6 of the Statement of Legal Authority expressly states that 2 O.S. §2A-3(A)(5) provides ODAFF with the authority to implement rules ensuring that any state whose waters may be affected by the activities allowed by a permit may submit written recommendations to ODAFF. If the recommendations or any parts thereof are not incorporated, ODAFF will notify the affected state in writing and provide the reasons therefore. In addition, ODAFF has adopted by reference the applicable portions of 40 CFR 122.10(c), requiring the agency to notify affected states of each permit application and to provide such state with an opportunity for a public hearing on the application. ODAFF has also adopted 40 CFR §122.4(d) by reference, prohibiting the issuance of a permit unless it ensures compliance with downstream water quality standards. Based on its review of the statutes and regulations governing the AgPDES program, EPA has determined that ODAFF has the requisite legal authorities in place to protect the rights of affected states.

In addition, although the CWA provides for EPA to directly administer the NPDES program if the state does not seek or obtain authorization, the original intent of Congress in enacting the statute was that states would implement the program. Section 101(b) of the CWA expressly provides that it is the policy of Congress that the states implement the permit program under §402 of the Act. CWA §402(b) gives states the right to apply to EPA to administer their own NPDES permit programs for CWA discharges within their jurisdiction, and provides that EPA must approve a state's application if it meets the requirements of the Act and 40 CFR Part 123. However, EPA retains an important oversight role under the CWA. EPA must have an opportunity to review each permit issued by the state and may formally object to permits that do not meet federal requirements. If the state does not adequately address the objection, authority to issue the permit transfers to EPA. Once a permit is issued, it is enforceable by the approved state and EPA. It is also enforceable by private citizens in federal court under CWA §505. In accordance with its responsibilities under the CWA, EPA will oversee ODAFF's implementation of the AgPDES program to ensure that the rights of downstream states are protected.

7. Comment Summary: Many commenters argued that EPA should remain the NPDES permitting authority in Oklahoma, arguing that it is EPA's responsibility because interstate waters are affected and EPA is better equipped to handle the program.

Response: Although the CWA provides for the EPA to administer the NPDES program where the state does not seek or receive authorization Congress intended states to administer the program. Section 101(b) of the CWA expressly provides that it is the policy of Congress that the states implement the permit program under §402 of the Act. CWA § 402(b) provides for states to apply to EPA to administer their own NPDES permit programs for CWA discharges within their jurisdiction. CWA §402(b) also provides that "[t]he Administrator shall approve each such submitted program" unless he determines that that the state's submittal does not meets specified requirements of the Act and 40 CFR Part 123. Because EPA has determined that the state of Oklahoma's submittal requesting authorization for ODAFF to administer the AgPDES program meets the requirements of CWA §402 and 40 CFR Part 123, EPA is statutorily required to authorize the program.

However, EPA retains an important oversight role under the CWA. EPA must have an opportunity to review each permit issued by the state and may formally object to permits that do not meet federal requirements. If the state does not adequately address the objection, authority to issue the permit transfers to EPA. Once a permit is issued, it is enforceable by the approved state and EPA, as well as by private citizens in federal court

under §505 of the CWA. EPA will oversee ODAFF's implementation of the program on an ongoing basis to ensure that it is in compliance with federal requirements. In addition, under §402(i) of the CWA, EPA retains independent inspection and enforcement authority under the NPDES program even after state program approval.

8. Comment Summary: Many commenters argued EPA should authorize ODEQ, not ODAFF, to implement the AgPDES program in Oklahoma. Several commenters stated that they believed ODEQ, with its history of water quality protection, would be a more appropriate choice.

Response: EPA does not have authority under the CWA to transfer the AgPDES program to ODEQ. The state of Oklahoma has not requested authorization for ODEQ to implement the AgPDES program, and ODEQ does not have state jurisdiction over the discharges at issue. The Governor of Oklahoma requested authorization for ODAFF to administer the AgPDES program (see the Governor's letter included as part of the State's submittal package). Further, the Oklahoma legislature has provided ODAFF with exclusive jurisdiction over the discharges covered by the program. Under state law, ODAFF has jurisdiction to regulate all point source discharges subject to the AgPDES program, i.e., discharges associated with CAFO operations, discharges from the application of biological pesticides or chemical pesticides that leave a residue, discharges from silviculture activities, and discharges of storm water from agricultural activities. For a detailed explanation of ODAFF's and ODEQ's jurisdiction under state law, see Section 1 of the Statement of Legal Authority provided by ODAFF as part of its submittal package and 27A O.S. §1-3-101.

9. Comment Summary: Several commenters opposed ODAFF's request for program approval because of concern over impacts to Indian Country. The Cherokee Nation of Oklahoma did not oppose the application, but submitted comments expressing concern over certain language in the MOA and whether it could be construed as affecting tribal water rights.

Response: In its MOA with EPA, as well as throughout the program documentation, ODAFF has stated that discharges to waters within Indian Country are outside of its regulatory jurisdiction. EPA will continue as the NPDES permitting authority for discharges to waters within Indian Country. ODAFF is bound by federal law to notify affected tribes of the opportunity to review and comment on draft permits.

As part of this program authorization review, EPA Region 6 has engaged all Oklahoma tribes and, at their request, individually consulted with several tribes on ODAFF's submittal. The Cherokee Nation stated its concerns in comments that EPA received during the public comment period. In response to these comments, the MOA between EPA and ODAFF has been revised as follows:

- a) Clarifying language describing ODAFF and EPA authority and responsibilities for the NPDES permit program in Oklahoma is provided at Section II, Scope of Authorization; Section II, Program Responsibilities; Section IV, Permit Processing, Review, and Issuance; Section V, Compliance Monitoring and Section VI, Enforcement.
- b) Clarifying language regarding ODAFF's notification of draft permit availability is added throughout Section III, Program Responsibilities and Section IV, Permit Processing, Review, and Issuance.
- c) Clarifying language describing what permits EPA will review in its oversight of the Oklahoma NPDES program is provided at Section IV, Permit Processing, Review, and Issuance.

10. Comment Summary: Many of the comments received were in opposition to CAFOs in general. These commenters expressed various concerns, including the negative environmental impacts caused by CAFO wastes, the possible harm to consumers from steroids, growth hormones and antibiotics, the potential spread of swine flu and the cruelty of combining hundreds, if not thousands, of animals together without natural vegetation or land on which to graze. Many of the commenters expressed general concerns over the water quality in Oklahoma and the fact that livestock waste is a major contributor of pollution to the state's waters. Several commenters pointed out that a number of Oklahoma waters are already impaired.

Response: Whether CAFOs should or should not exist in the first place is outside the scope of this authorization, as is a discussion of federal CAFO regulations. The NPDES program under the CWA covers discharges of pollutants from point sources to waters of the United States and "point source" is defined under §502(14) of the CWA to include concentrated animal feeding operations. Federal regulations governing CAFOs are established at 40 CFR §122.23 and are applicable to state programs. CWA §402(b) gives states the right to apply to EPA to administer their own NPDES permit programs for CWA discharges within their jurisdiction, including discharges from CAFOs, and provides that EPA must approve a state's submittal if it meets the requirements of the CWA and 40 CFR Part 123. After a careful review of ODAFF's program submittal, EPA has determined it meets the requirements of the CWA and 40 CFR Part 123.

11. Comment Summary: Two commenters argued that EPA should deny ODAFF's request for program approval because ODAFF had not provided a plan for how it will apply Oklahoma's water quality standards to AFOs (animal feeding operations) and CAFOs discharging to High Quality Waters (HQWs) and Outstanding Resource Waters (ORWs). Specifically, ODAFF has not proposed special regulations for AFOs in sensitive watersheds, such as the Illinois River Watershed.

Response: The CWA does not require states to provide special regulations for AFOs or CAFOs discharging to sensitive watersheds. In fact, AFOs are not regulated under the NPDES program unless they meet the definition of "CAFO" established in federal regulations at 40 CFR §122.23. However, when issuing NPDES permits, states are required to comply with the requirements of CWA §301(b)(1)(C) and 40 CFR §122.44(d) to include water quality-based effluent limitations (WQBELs) when necessary to meet water quality standards. Accordingly, AgPDES permits must include WQBELs when necessary to meet water quality standards, including any water quality standards established for high quality waters to which a permitted CAFO discharges. Oklahoma law at Title 82 O.S. §1085.2 empowers the Oklahoma Water Resources Board (OWRB) to "adopt, modify or repeal and promulgate standards of quality of the waters of the state, and to classify such waters according to their best uses in the interest of the public under such conditions as the OWRB may prescribe for the prevention, control and abatement of pollution. The standard of quality of water of the state adopted by the Board pursuant to the provisions of Title 82 O.S. §1085.30 of the act shall be utilized by all appropriate State environmental agencies in implementing their respective duties to abate and prevent pollution to the waters of the State." Subchapter 3 of the OWQS, found at OAC 785:45-3-2, states that Oklahoma high quality waters (HQW) and Sensitive Public and Private Water Supplies (SWS) water quality must be maintained and protected. Further, no degradation of water quality shall be allowed in outstanding resource waters (ORWs). Part 5 of the OWQS addresses specifically at OAC 785:45-5-25 that waters designated in the OWQS as ORWs are prohibited from having new point source discharge(s) of any pollutant or increased load of any pollutant from existing point source discharge(s). Part 5 of the OWQS further details conditions that must be met by any discharge to Tier 2

designated waters, including HQW and SWS. These standards are not discretionary for ODAFF when developing an AgPDES permit.

12. Comment Summary: The CWA imposes no requirement that states protect federally-listed species in order to obtain NPDES program authorization and EPA lacks discretion to require that states do so. (See *National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2012)). However, EPA has consulted with the US Fish and Wildlife Service (FWS) under ESA §7(a)(2) on the effects of EPA's issuance of the NPDES General Permit for Discharges from Concentrated Animal Feeding Operations in Oklahoma (OKG010000), effective February 1, 2012. That consultation yielded a Biological Opinion (BO) by the Service that included an incidental take allowance so long as certain terms and conditions were met. The CAFO general permit will transfer to ODAFF upon program approval as detailed in the MOA between EPA and ODAFF. The FWS submitted the following comments:

It should be noted that the Service, in our BO [on EPA's issuance of a general permit authorizing discharges from concentrated feeding operations], also issued an incidental take statement in accordance with section 7(b)(4) and 7(o)(2), which states that taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the ESA provided that such taking is in compliance with the TCs. Because EPA will no longer be implementing TC3, parts D, E, and G, the incidental take statement will no longer be valid, thus any permitted discharge into designated sensitive watersheds (Figures 1-4 in the BO) would be considered a violation of the ESA, as described in the BO.

Response: EPA doubts that "any permitted discharge into designated sensitive watersheds... would be considered a violation of the ESA" unless that discharge results in "actual death or injury" to an animal of a listed species. See 50 C.F.R. §17.3; *Babbitt v. Sweethome Chapter of Communities for a Greater Oregon*, 515 U.S. 697 (1995).

The terms and conditions (TC) of the BO dated February 17, 2012, and produced from Endangered Species Act §7(a)(2) consultation between EPA and FWS include TC 3 D, E, and G that require EPA to report certain data relating to Notices of Intent to be covered and discharge monitoring reports to FWS. If and when those reports indicate that assumptions underlying FWS's biological opinion (BO) are no longer valid, the BO contemplates that EPA will reinitiate consultation under ESA §7(a)(2) with the objective of determining whether EPA should reissue the permit with additional and/or different eligibility requirements and/or water quality based conditions to avoid and minimize takes.

The EPA-issued permit requires that covered facilities report their discharges to FWS. EPA will continue to report the remainder of the data at issue to FWS until the BO reinitiation thresholds are exceeded or ODAFF reissues the permit. FWS will thus be provided with the information it requested in the BO. In EPA's opinion, incidental take protection will likely continue under the permit until the BO's thresholds are exceeded. Because EPA will then generally lack authority to reissue the permit, however, there will be no potential EPA action subject to consultation under ESA §7(a)(2).

13. Comment Summary: In its comments, the FWS "assumes" other water quality related reasonable and prudent measures and terms and conditions that the EPA-issued CAFO NPDES permit imposes on permittees will also be

in CAFO permits ODAFF reissues due to the anti-backsliding requirements of CWA §402(o) and 40 C.F.R. §122.44(l)(1).

Response: EPA included those water quality based conditions in the permit in reliance on *NRDC v. U.S. EPA*, 859 F.2d 156, 167 - 170 (D.C. Cir. 1988), not on the basis of CWA §§301(b)(1)(c), 303(e), or 303(d). Whether or not they are subject to statutory or regulatory anti-backsliding requirements is not at issue in this program authorization action.

14. Comment Summary: The FWS also commented that ODAFF “will be responsible to determine if actions associated with their [sic] issuance of permits [e.g., for pesticide discharges] will result in impacts to federally-listed species.” FWS further offered its assistance in ODAFF’S development of a habitat conservation plan that would offer incidental take protection.

Response: The CWA imposes no requirement that states protect federally-listed species in order to obtain NPDES program authorization and EPA lacks discretion to require that states do so. *See National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2012); *American Forest & Paper Association v. U.S. EPA*, 1378 F.3d 291 (5th Cir. 1998). Whether ODAFF undertakes future efforts to protect or conserve federally-listed species is a matter for ODAFF to decide.

15. Comment Summary: Two commenters requested that EPA schedule additional hearings to give the public more time to fully inspect ODAFF’s application.

Response: EPA declines the request for additional hearings. The public has been given ample opportunity to receive information on ODAFF’s submission and to comment on the adequacy of its program. As soon as ODAFF’s submission was deemed complete, EPA posted all submitted documents, i.e. the program description (including funding, personnel requirements and organization, and permit and enforcement procedures), the Statement of Legal Authority, copies of applicable state statutes and regulations, and the MOA to be executed by the Regional Administrator of EPA Region 6 and the Commissioner of Agriculture for ODAFF, on an EPA website established for the purpose of keeping the public up-to-date on the state’s submission and the approval process.

In accordance with the requirements of 40 CFR §123.61, notice of the state’s submission was published in the Federal Register on September 24, 2012, and in the Daily Oklahoman and the Tulsa World newspapers on September 25, 2012. Each of the notices announced a 45 day public comment period and provided details concerning both an informal public meeting and a formal public hearing to be held in Oklahoma City on October 25, 2012. Notice of the 45 day comment period, the informal public meeting and the formal public hearing was also posted on EPA’s website. The public meeting included a power point presentation on Oklahoma’s request for AgPDES program approval and a question and answer session. The October 25th public hearing was held in accordance with 40 CFR §124.12 and both oral and written comments for the official record were accepted. Prior to the close of the public comment period, EPA also met with various Oklahoma Indian tribes to make them aware of the state’s submittal and provide them an opportunity to comment. As a result of these efforts, EPA received over 300 comments from the public. EPA does not believe additional hearings on the state’s request for approval of the AgPDES program are necessary or would be beneficial to the approval process.

16. Comment Summary: Several commenters opposed ODAFF's request for program approval citing the current water quality problems in the Illinois River Watershed caused by CAFOs.

Response: EPA, the states and tribes recognize that the water quality in the Illinois River watershed degraded throughout the 1990s. Storm water from fast growing urban areas upstream of Illinois River, runoff from fields where poultry waste has been used as fertilizer, and wastewater discharges have been highlighted as likely sources of water quality threats and impairments. It is premature to conclude that poultry CAFOs are the significant or primary source of phosphorus contributions the Illinois River watershed. However, significant investments have been made by EPA, the states, and communities in both Arkansas and Oklahoma to improve water quality in the Illinois River Watershed. Considerable efforts are underway to identify the causes, extent, and sources of water quality threats and impairments to the watershed. Extensive remedial efforts have been carried out and will continue into the future. In recent years, a number of wastewater treatment plants in the watershed, likely sources of nutrients (nitrogen and phosphorous) in the past, have undergone major renovations to reduce their nutrient effluents. EPA, since November 2009, has committed significant resources towards developing a comprehensive, multi-jurisdictional watershed model aimed at improving our understanding of the relationship between sources of phosphorus and water quality. Ultimately, EPA's model should provide the scientific basis for developing one or more total maximum daily loads (TMDLs) that will establish a strategy for addressing the nutrient issues that have been identified in the watershed. The goal is to improve water quality in the Illinois River and its tributaries so that both Arkansas' and Oklahoma's water quality standards are met.

17. Comment Summary: Several commenters in opposition to ODAFF's request for program approval expressed concern that ODAFF intends to create additional CAFOs in Oklahoma. These commenters argued that ODAFF intends to add 50 new CAFO NPDES general permits and 10 new individual permits a year according to budget information included in Chapter 4 of ODAFF's Program Description, Resources and Funding.

Response: The numbers referred to by the commenters are estimates of CAFOs that will apply for permit coverage, not CAFOS that will be created by ODAFF. These are either animal operations that already exist and have not yet applied for NPDES permit coverage or animal operations that will begin operation after approval of the AgPDES program. In Chapter 4 of its Program Description document, as required by 40 CFR §123.22(b), ODAFF estimated and provided to EPA a description of the cost of establishing and administering the proposed AgPDES program for the first two years after program approval. ODAFF's estimate predicts that during its first year of operating the program, fifty (50) CAFOs will apply for coverage under the general permit and ten (10) facilities will apply for individual permit coverage. ODAFF's estimate that 183 CAFOs in the state might have NPDES permit coverage by the second year of program authorization is consistent with the number of CAFOs that were covered by EPA's 1993 permit. Available statistics from 2004 suggest that the total swine, feeder cattle, and dairy operations in Oklahoma of adequate size to be regulated under the federal CAFO program numbered about 300. These numbers exclude dry litter poultry CAFOs within the state.

18. Comment Summary: Several commenters in opposition to approval of the AgPDES program expressed concern that if ODAFF's request for program approval were approved Oklahoma would be the only state in the nation to allow a department of agriculture to regulated CAFOs.

Response: The CWA does not require EPA, when making its determination to approve or deny a program authorization request, to account for which state agency would implement the program, other than to ensure that the agency has proper legal authority to implement the program as specified in §§402 and 304(i) of the CWA and 40 CFR §123.1(g)(1). Whether or not ODAFF would be the sole department of agriculture currently authorized to implement a portion of the federal NPDES program is not relevant to whether ODAFF should be authorized to administer the NPDES program for the category of discharges for which it has regulatory authority under state law.

19. Comment Summary: Two commenters argued that EPA should not approve the AgPDES program because ODAFF's regulations related to CAFOs are less stringent than federal CAFO requirements. Specifically, the commenters argued that ODAFF's rules create a special class of Animal Feeding Operations (AFOs) which would be regulated and permitted as medium sized CAFOs under federal law. Further, in determining whether an AFO is a CAFO subject to regulation under the NPDES program, ODAFF's regulations require an actual discharge. At least for certain sized facilities, this would mean that the AFO would not be required to obtain an AgPDES permit unless there is an actual discharge.

Response: Federal regulations at 40 CFR §122.23, §122.44 and §125.3 are incorporated by reference into the AgPDES Rules at OAC 35:44-1-2. Because the ODAFF regulations adopt the federal regulations by reference, including the requirements for permitting of medium AFOs based on a discharge, they are as stringent as the federal regulations.

An AFO is defined as a Large CAFO if it confines 125,000 or more chickens (other than laying hens, if the AFO uses other than a liquid manure handling system). An operation that confines 37,500 to 124,999 chickens for 45 days or more in a 12-month period would be classified as a Medium CAFO if it met one of the following conditions:

- a) It discharges pollutants into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device.
- b) It discharges pollutants directly into waters of the U.S. that originate outside the facility and pass over, across, or through the facility or otherwise come into direct contact with the confined animals.

Federal regulations at 40 CFR §412 contains the Effluent Limitations Guideline (ELG) applicable to CAFOs. The CAFO ELG establishes the technology-based effluent limitations and new source performance standards (NSPS) for those operations that meet the regulatory definition of a Large CAFO. NPDES permit limitations are based on Best Professional Judgment (BPJ) when ELGs have not been issued pertaining to an industrial category or process. The NPDES regulations require a permit writer to establish permit limitations on a case-by-case BPJ basis when ELGs are inapplicable, or in combination with the effluent guidelines, where the ELG apply to only certain aspects of the operation or certain pollutants. See CWA §402(a)(1) and 40 CFR §125.3. There is no ELG for Medium CAFOs. Nonetheless, just as for any other permitted facility, the CWA requires that any NPDES permit for Medium CAFOs include technology-based effluent limitations. See 40 CFR §§122.44(a)(1). In the absence of ELGs, technology-based limits in the permit must be determined by the permit writer using BPJ.

20. Comment Summary: One commenter in opposition to ODAFF's request for program approval stated that integrators should be regulated under the AgPDES program and that requirements of integrators' contracts impacting permit requirements should be subjected to scrutiny to ensure that the operation of the CAFO meets

the requirements of the CWA. The commenter argued that EPA should deny ODAFF's request for program approval because it does not address the issue of large integrator control over animal wastes.

Response: Federal regulations at 40 CFR §§122.2 and 122.23(d)(1) regarding permit requirements for CAFOs, as published on July 1, 2011, are incorporated by reference into the AgPDES Rules at OAC 35:44-1-2. Under the AgPDES program, and consistent with federal regulations, an integrator who meets the definition of "owner or operator" is regulated under AgPDES.

Under the MOA between ODAFF and EPA, ODAFF must conform the AgPDES program with new or revised promulgations of federal regulations by revising the program within one year of promulgation of the new or revised federal regulations, unless the state must amend or enact a statute to make the required revision or if a state legislative process must be completed, in which case such revision shall take place within two (2) years. See MOA Section VII.C.5. See also 40 C.F.R. §123.62(e).

21. Comment Summary: Two commenters in opposition to ODAFF's request for program approval argued that penalties to be collected by ODAFF under the ApPDES program are less stringent than federal penalties for the same violations.

Response: EPA disagrees that ODAFF's penalties are less stringent than federal penalties for the same violations. Neither the CWA nor 40 CFR Part 123 require a state seeking NPDES authority to adopt EPA's penalty policy or to calculate penalties in exactly the same way as EPA. However, CWA §402(b) and 40 CFR §123.27 do require that states have enforcement authority, including civil and criminal penalties, adequate to address violations of a permit or the permit program. 40 CFR §123.27 outlines the enforcement capabilities that must be included in a state program. Under that section, the state must have authority to seek civil penalties in the amount of at least \$5,000 per day of violation, seek criminal fines (for willful or negligent violations) in the amount of at least \$10,000 per day of violation, and seek criminal fines for knowing false representations or certifications, or knowingly rendering monitoring devices inactive in the amount of at least \$5,000 for each instance of violation.

ODAFF's penalty authority is consistent with these requirements. Under the AgPDES program, the Director is authorized to seek civil penalties for violations of the Oklahoma Agriculture Pollutant Discharge Elimination System Act, any permit condition or limitation implementing the Act, or any administrative compliance order issued by the AgPDES Director in an amount of up to \$10,000 per day for each violation. Criminal violations are also punishable by a penalty of up to \$10,000 per day for each violation. Any person who knowingly makes any false material statement, representation or certification in, omits material from, or tampers with any application, notice, record, report, plan or other document filed or required to be maintained under the Act, or who knowingly falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained under the Act is subject to a fine of up to \$10,000 per day for each violation. A second such conviction is subject to a fine of up to \$20,000 per day for each violation. See 2 O.S. §2-2A-9.G.-H.

Under the CWA, the state has flexibility in how it calculates penalties, as long as the penalties are consistent with the requirements of the CWA and 40 CFR §123.27. Despite this flexibility, ODAFF has agreed to follow the principles outlined in applicable EPA CWA penalty policies or any future revisions of these policies. See Section VI.B.1 of the MOA. In addition, although states seeking NPDES authority are not required to have procedures for the Director to assess administrative penalties, such procedures are recommended. See Note to 40 CFR

§123.27(c). As explained in ODAFF's Statement of Legal Authority, the AgPDES Director is authorized to assess administrative penalties for violations of the Oklahoma Agriculture Pollutant Discharge Elimination System Act, or any permit, rule, order or condition or limitation implementing the Act of up to \$10,000 per day for each violation. The total amount of the administrative fine shall not exceed \$125,000 per violation. See 2 O.S. §2-2A-9.F. This authority mirrors EPA's administrative penalty authority under §309(g) of the CWA, which provides EPA the authority to seek administrative penalties of up to \$10,000 per day for each violation, with a maximum allowable penalty of \$125,000 (or only \$25,000 for Class I violations). In assessing such penalties, the AgPDES Director takes into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, the ability to pay, any prior history of violations, the degree of culpability, the economic benefit savings, if any, resulting from the violations, and any other matters as justice may require, which also mirror the factors to be considered by EPA under the CWA. See 2 O.S. §2-2A-9.F.2 and CWA §309(g)(3).

Based on a careful review of Oklahoma statutes and the state's submission, EPA believes ODAFF's penalty authority is consistent with the CWA and federal regulations. As part of its oversight responsibility, EPA will review ODAFF's enforcement actions on an ongoing basis to ensure that the penalties it seeks are appropriate to the violation and consistent with the CWA. EPA always retains its independent enforcement authority. In addition, where EPA determines that ODAFF has not taken timely enforcement action against a violator, or that the penalty sought by ODAFF was not appropriate under the Act, EPA can proceed with its own enforcement action under §309 of the CWA. As agreed to in the MOA between EPA and ODAFF, one of the factors EPA will look at in determining whether ODAFF has taken appropriate enforcement action is whether ODAFF has sought or imposed "penalties in amounts which EPA believes to be substantially adequate in comparison to the amounts which the EPA would require under similar facts." MOA Section VI.E.4.

22. Comment Summary: The Osage Nation Historic Preservation Office submitted comments stating that the AgPDES program would most likely not adversely affect properties of cultural or sacred significance to the Osage Nation. The comment letter stated that the Osage Nation has no further concern with the project.

Response: EPA appreciates the comments.